

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
1:06cv228**

KENNETH G. MESSE	Plaintiff,)	ORDER AND NOTICE
Vs.	BORG WARNER AUTOMOTIVE)	
	TURBO SYSTEMS CORP.; PEG)	
	GLENN; and MYRA BUTLER,)	
	Defendants.)	

THIS MATTER is before the court on defendants' Suggestion of Death made upon the record (#18). In accordance with Rule 25(a)(1), Federal Rules of Civil Procedure, defendants have made a suggestion upon the record that plaintiff, Kenneth G. Messer, passed away on December 3, 2006. At the time of his death, Mr. Messer was proceeding *pro se* in this employment/FMLA action against defendants.

Rule 25(a)(1) provides the court, the remaining parties, and the administrator of plaintiff's estate with precise guidance in such circumstances:

If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

It appears to the court that the plaintiff, Kenneth G. Messer, died on December 3, 2006 and that no executor or administrator has been appointed to administer his estate. It further appears from the materials presented by the defendant that Joan Baker Messer Silvers would have been the heir at law, pursuant to North Carolina law of the deceased plaintiff, if he had died intestate.

NOTICE

Notice is hereby given to Joan Baker Messer Silvers to have a personal representative appointed and substituted as a party plaintiff in this action or if an executor or administrator has been appointed, to have said executor or administrator appointed and substituted as a party plaintiff in this action within 90 days of December 8, 2006, or the action will be dismissed.

ORDER

IT IS, HEREBY, ORDERED that the United States Marshal shall deliver a copy of this Order and Notice to Joan Baker Messer Silvers by delivering a copy of this Order and Notice to her personally. It is further **ORDERED** that the Clerk of this court is instructed to send a copy of this Order and Notice addressed to the administrator of the estate of Kenneth G. Messer and the executor of the estate of Kenneth G. Messer to Mr. Messer's last known address and further that the Clerk of this court shall send a copy of this Order and Notice to the Clerk of Superior Court of Buncombe County, attention: "Estates Administration". It is further **ORDERED** that the administrator or the executor of the estate of Kenneth G. Messer shall file a

Motion for Substitution or a Stipulation of Dismissal within 90 days of December 8,
2006.

Signed: January 4, 2007

Dennis L. Howell

Dennis L. Howell
United States Magistrate Judge

